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NOV 4 1940

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 505

JOHANNES B. KESSEL and LOUIS HOFFBERG,
Petitioners,

vs.

VIDRIO PRODUCTS CORPORATION,
Respondent.

Reply Brief for Petitioners.

J. ROBERT COHLER,
10 So. La Salle Street,
Chicago, Illinois,
Counsel for Petitioners.

I N D E X .

| | PAGE |
|------------------|------|
| Argument | 1 |
| Conclusion | 7 |

CITATION.

| | |
|-------------------------------------------------------|---|
| Drum v. Turner, 219 Fed. 188, 191 (C. C. A. 8th)..... | 5 |
|-------------------------------------------------------|---|

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*To the Honorable the Chief Justice and Associate
Justices of the Supreme Court of the United States:*

In reply to the brief of the Respondent, we respectfully
present the following:

ARGUMENT.

Respondent's brief contains the statement that free circulation of air within the dome is not the invention secured by the patent in suit and covered by its claims. Respondent seeks to substantiate this statement by its argument that the invention urged in the Patent Office was the forcing of a blast of air *directly* against the cover of the washing machine, by a fan mounted above the motor, on a vertical axis. (Brief p. 5.)

The Kessel patent provides a motor and fan which are not enclosed in a housing, and as a result thereof, the rotation of the fan forces air against the motor, cover and dome. We submit that the Kessel patent is entitled to the same construction whether the patentee describes the action of the fan as causing free circulation of air within the dome or whether he uses a more forceful expression and says that the fan throws a blast of air directly against the cover. Obviously, both expressions mean that the fan creates a turbulence of air within the dome which results in cooling the motor, cover and dome.

It should be noted, however, that the expression "*blast* of air *directly* against the cover of the washing machine" is not contained in all of the Kessel claims. For example, Claim 5 states that the fan causes air currents to be "directed through one opening against the motor, casing and cover and discharged through the other of said openings."

The testimony of Andres, an expert witness, conclusively proved that the function of the fan in the Kessel machine remains the same regardless of where it is positioned within the dome (Rec. 204, 205). The Patent Office Examiner also maintained that the function of the fan is the same whether it is above or at the side of the motor. (Plaintiff's Exhibit 10, page 25; Physical Exhibit.)

Petitioners, in their brief in support of their Petition for Certiorari, pointed out that Kessel states in his specifications that one of the objects of his invention is to provide in a washing machine a means for causing a circulation of air over the motor and against the cover and dome (Rec. 329, Column 1, Lines 13 to 33).

It should be noted that Respondent's brief does not challenge the statement contained in Petitioners' original brief that the Kessel claims were never amended with respect to the essential provision for free circulation of air within the dome.

The Kessel invention was the first and original invention to provide for the following:

1. A portable washing machine capable of being placed on a stove, or of having heat applied to the bottom of the machine, *so as to wash, boil and sterilize the contents thereof simultaneously.*

2. An **unenclosed** fan located within the dome and above the cover or lid of the machine, to create a turbulence and free circulation of air within the entire area of the dome for the purpose of cooling the motor, lid and dome.

The District Court, at the conclusion of the evidence and after examining the prior art, including the Engberg patent, stated: "that it was Kessel's patent that here blazed the trail for any portable washing machine" (Rec. 238). In its findings of fact, the District Court found that: "The Kessel invention was a pioneer invention, covering a function never before performed" (Rec. 301).

Respondent's brief also contains the statement that during the prosecution of the Kessel application in the Patent Office, art was cited (referring to Engberg patent) which showed every element of the claims as originally filed, including cooling of the motor by a fan on its shaft, *and some incidental cooling of the closure.* (Brief p. 5.)

The foregoing statement appears to have been based on the statement contained in the opinion of the Circuit Court of Appeals that "The prior art, perhaps best exemplified by the patent to Engberg, presents a combination which element for element is well-nigh identical with that of Kessel." (Opinion page 383.) We respectfully submit that the foregoing statements contained in respondent's brief and in the opinion of the Circuit Court of Appeals are not only contrary to the evidence and the findings of fact made by the District Court, but these statements are also contrary to Engberg specifications as set forth in his patent. Andres, the expert witness, testified that in the

operation of the Engberg machine, the fan would only cool the motor and no air would flow against the closure and there would be no free circulation of air within the dome, because the motor and fan were enclosed in a housing (Rec. 202, 203, 205).

The District Court in its findings of fact found that the Kessel invention was not disclosed by the Engberg patent (Rec. 301).

Engberg, as we pointed out in our original brief, **specified that his motor and fan be enclosed in a housing, in order to prevent recirculation of air between the dome and the cover** (Rec. 404, Col. 1). Andres testified that if heat were applied to the Engberg machine, when water was in it, the water would come to a boil, steam would be generated, and since the cover is locked to the container, there would be an explosion (Rec. 202). Andres further testified that the Engberg construction, in its preferable form, calls for a machine to be used with a liquid, such as a chemical cleaner, or a machine used with water and vapor, and that in order to keep the water hot it was necessary to eliminate the circulation of cool air within the dome (Rec. 206).

Even if we ignore the opinion of the expert witness, the findings of fact made by the District Court and the statements contained in Engberg specifications, a mere inspection of the Kessel and Engberg patents themselves prove conclusively that the concepts of these inventions are entirely different and that the Engberg invention will not perform the function of the Kessel patent. It is apparent that the Circuit Court of Appeals arrived at its conclusion through the erroneous assumption that the Kessel invention followed Engberg, element for element, whereas, the Engberg invention is designed and constructed so as to operate to prevent the very objects and purposes of the Kessel invention.

We concede that the Engberg washing machine permits cleaning of the contents in a chemical or the washing of clothes in hot water which had been placed in the tub. The fact that Engberg specified that the dome was to be locked to the container in order to prevent vibration and the further fact that Engberg specifications and drawings make no provision for steam vents and also and the fact that the Engberg patent does not contain one statement that heat could be applied to the tub, all prove conclusively that Engberg did not intend to apply heat to his machine, and that heat could not be applied thereto. It was Kessel who conceived the idea of a portable washing machine which would permit heat to be applied to it instead of pouring hot water into the tub. To carry out this concept, Kessel, unlike Engberg, provided an *unencased* motor and fan within the dome, and unlike Engberg, Kessel provided steam escapes, and unlike Engberg, Kessel clearly stated in his specifications that one of the objects of his invention was to provide a washing machine which could be placed upon a stove or beneath which heat could be applied.

The merits of this case must be decided upon the *sole* issue as to whether or not the Kessel invention of free circulation of air within the dome was disclosed by the Engberg patent. The finding of fact by the District Court that the Kessel invention was not disclosed in any prior art, including the Engberg patent, was not only substantiated by the undisputed evidence, but this was the only finding which the District Court could possibly have made pertaining thereto.

Inasmuch as respondent has cited the case of *Drum v. Turner*, (C. C. A. 8th) 219 Fed. 188, 191, which is also cited in petitioners' original brief, we are willing to rest our entire case upon the holding contained therein that a patentee is not estopped by reason of amendments made by

him during the prosecution of his application from claiming the benefits of improvements which were not disclosed by the prior references.

It is significant that the respondent, as one of the assignors of the Kessel patent, was thoroughly familiar with the Engberg patent when it accepted an exclusive license under the Kessel patent and agreed to pay royalties to the petitioners on said patent.

After hearing all the evidence, the District Court, in comparing respondent's Model No. 700 and the Kessel machine, said:

"It is very apparent, I think, to even the untrained or non-technical, or non-mechanical eye, that practically the only difference in these two machines is that one has a vertical motor and in the other it is horizontal, and for all purposes, in my opinion, one machine is just a copy of the other * * *" (Rec. 238).

The District Court, in its findings of fact, found:

"That the construction, function, purpose and mode of operation of said washing machine Model No. 700 is identical with the invention covered by the claims of the Kessel patent" (Rec. 305-306).

It is also significant that after hearing all of the evidence, the District Court in its findings of fact found that respondent constructed, manufactured, and sold its Model No. 700 in an attempt to circumvent the claims of the Kessel patent (Rec. 306).

Although Kessel is the original inventor of a portable washing machine capable of washing, boiling and sterilizing the contents thereof simultaneously and although the District Court stated that the Kessel patent blazed the trail for any portable washing machine, and although the District Court found that the Kessel invention was a pio-

neer invention, covering a function never before performed, Kessel will be deprived of the fruits of his invention unless this Court grants the petition for a writ of certiorari herein. The Kessel invention is so novel as to be of vital concern to the entire washing machine industry.

It is apparent that the Circuit Court of Appeals has overlooked or disregarded the findings of fact made by the District Court that the invention claimed in the Kessel patent was not disclosed by any prior art, including the Engberg patent, and that the Circuit Court of Appeals has overlooked the principle of law that a patentee is not estopped from claiming and securing by his amended claim every useful improvement which he has invented, which is not disclosed by the prior references.

CONCLUSION.

It is, therefore, respectfully submitted that the United States Circuit Court of Appeals erred in reversing the decree entered by the District Court.

We submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

J. ROBERT COHLER,

Counsel for Petitioners.